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10 Attorneys for Plaintiff

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION

14 UNITED STATES OF AMERICA,) No.: CR 08-00156 JW
15 Plaintiff,) UNITED STATES' PRETRIAL
16 v.) CONFERENCE STATEMENT AND
17 STEVEN RODRIGUEZ,) TRIAL MEMORANDUM
18 Defendant.) Hearing: July 24, 2008
19) Time: 9:00 AM
19) Court: Hon. J. Ware

20 The United States of America, through its counsel Jeffrey Schenk and Richard
21 Cheng, Assistant United States Attorneys, hereby submits its Pretrial Conference Statement and
22 Trial Memorandum in the above-captioned case.

23 I. STATEMENT OF EVIDENCE

24 A. Charges

25 A federal grand jury returned a one count indictment against the defendant on
26 March 12, 2008 charging him with a violation of 18 U.S.C. § 922(g)(1), felon in possession of a
27 firearm and ammunition. The defendant was arraigned on the indictment on April 10, 2008 and
28 pleaded not guilty. On July 9, 2008, the grand jury returned a superseding indictment against the

1 defendant charging him with one additional count of 18 U.S.C. § 922(g)(3), controlled substance
2 user in possession of a firearm and ammunition. Defendant is expected to plead not guilty to the
3 additional count at his arraignment on July 17, 2008. The last day for Speedy Trial Act purposes
4 is July 24, 2008. However, the Court issued in a minute order on July 8, 2008 excluding time
5 "sufficient to start trial on August 5, 2008."

6 B. Facts

7 In the morning of February 23, 2007, the Santa Cruz Sheriff's Department was
8 dispatched to 1535 San Andreas Rd. in Watsonville, California, to investigate a report of a man
9 with a shotgun in the parking lot. 1535 San Andreas Road is the address of the Manresa Lodge,
10 which was owned and operated by Sophia Watkins. Watkins lived on the ground floor with her
11 four children. Steven Rodriguez, who was on active CDC parole for a felony domestic violence
12 conviction, periodically lived with Watkins in her ground floor apartment. Rodriguez and
13 Watkins had been romantically involved, but apparently were not in a relationship on February
14 23.

15 The Manresa Lodge has two apartments (numbered 3 and 4) located on the
16 second floor. On February 23, apartment #3 was occupied by Thomas Houston and apartment #
17 4 was occupied by Brian "Ted" Anderson and Peggy Spannbauer.

18 At about 7:30 a.m. on the morning of February 23, Thomas Houston noticed
19 Steven Rodriguez roaming the parking lot with a shotgun. Houston called Peggy Spannbauer, a
20 friend of Rodriguez, in the hope that she would be able to persuade him to put the gun down
21 without the need for police intervention. Spannbauer looked out her window and saw Rodriguez
22 circling the parking lot holding the shotgun, crying "Sophia." Spannbauer told her roommate,
23 Brian "Ted" Anderson, what she saw. Anderson called the police. Spannbauer convinced
24 Rodriguez to come upstairs, and she tried to calm him, but he told her he did not want her
25 involved in the situation.

26 While upstairs, Rodriguez approached Houston's apartment and asked if he could
27 come in to brush his teeth or get some water. Houston, who was on probation after a felony
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1 conviction, told him he could not come in with the shotgun. Rodriguez asked for help unloading
2 the gun, but Houston told him he could not help, and that Rodriguez would have to leave the gun
3 outside. After some time, Rodriguez agreed. He wiped his fingerprints from the gun, wrapped it
4 in a towel and left it outside the apartment, then came inside Houston's apartment. Rodriguez
5 sat inside the apartment talking with Houston. At approximately 8:30 a.m., the Sheriff's
6 Department arrived, and Houston and Rodriguez emerged from the apartment at the request of
7 the officers. Rodriguez was verbally resistant and slow to comply with the Deputy's commands,
8 but the Deputy was eventually able to talk him down from the upstairs balcony and he was
9 arrested without incident.

10 Rodriguez told the officers that he came to be in possession of the shotgun after
11 disarming Watkins during a fight they had earlier in the morning. He claimed that the gun had
12 hit her face as he yanked it away from her, leaving a red mark. He also explained that Watkins
13 had locked him out of the house, leaving him nowhere to put the gun; he was afraid to leave the
14 weapon unattended in the apartment complex because he did not trust his neighbors. At one
15 point, Rodriguez claimed that he expected someone to call the police, and that he planned to give
16 them the gun when they arrived. He admitted, however, that he knew he was not supposed to
17 have firearms. Watkins was interviewed the next day by officers. She denied the altercation,
18 and did not have any red marks on her face. She said that she had left the house with her children
19 because Rodriguez was talking to himself and appeared to be under the influence of drugs. She
20 admitted to owning the gun, but claimed that Rodriguez must have found it by searching through
21 her possessions, and that he had retrieved it himself. Both parties agreed that Watkins had left
22 the scene around 7:30 a.m. with her children, locking Rodriguez out of the apartment.

23 On the day of his arrest, February 23, 2007, Rodriguez was taken to Dominican
24 Hospital for a blood draw. He tested positive for methamphetamine, amphetamine, and cocaine.
25 He was then transported to the county jail. In conversations with officers, he admitted
26 amphetamine/methamphetamine use. Further investigation by agents revealed that on 2/8/07,
27 Rodriguez had given a urine test analysis positive for amphetamine/methamphetamine.

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1 Additionally, he has a long history of drug use. He was incarcerated on a domestic violence
2 conviction from January to November 2004, and continued to use illegal drugs after being
3 paroled. He has failed roughly fifteen (15) drug tests.

4 C. Interstate Commerce of the Handgun

5 The firearm recovered was a Remington Model 870 12 gauge pump-action
6 shotgun, serial number V631321V. One round of 12 gauge ammunition contained the head-
7 stamp "R-P"; another round of 12 gauge ammunition contained the head-stamp "Peters"; another
8 round of 12 gauge ammunition contained the head-stamp "Duck Symbol"; the last two rounds of
9 12 gauge ammunition contained the head-stamp "Sellier & Bellot." The firearm was
10 manufactured outside California by the Remington Corporation in New York before it traveled
11 in interstate commerce and was received and possessed in California. The "R-P" ammunition
12 was manufactured in Arkansas or Connecticut; the "Peters" ammunition was manufactured in
13 Ohio; the "Duck Symbol" ammunition was manufactured in Minnesota; and the "Sellier &
14 Bellot" ammunition was manufactured in the Czech Republic, all before traveling in interstate
15 commerce and being received and possessed in California.

16 D. Prior Felony Convictions.

17 Prior to February 23, 2007, the defendant had the following felony convictions: a
18 Salinas conviction for inflicting corporal injury on a spouse/cohabitant, on February 4, 1999; a
19 Monterey conviction for inflicting corporal injury on a spouse/cohabitant on January 5, 2004.

20 E. Physical Evidence

21 The handgun and ammunition (5 unfired 12 gauge rounds) will be presented,
22 along with various photographs taken on February 23, 2007.

23 II. STATEMENT OF THE LAW.

24 A. Violation of 18 U.S.C. § 922(g)(1)

25 1. **Elements of the offense**

1 In the first count of the indictment, the defendant is charged with being a felon in
2 possession of a firearm in violation of Section 922(g)(1) of Title 18 of the United States Code.

3 The elements of the offense are:

- 4 • the defendant knowingly possessed the firearm as described in the
5 indictment;
- 6 • the firearm had been shipped or transported from one state to another, or
7 from a foreign nation to the United States; and
- 8 • at the time the defendant possessed the firearm, the defendant had been
9 convicted of a crime punishable by imprisonment for a term exceeding
one year.

9 **2. Knowingly Possessed**

10 The government must prove that the defendant knowingly possessed the firearm.

11 It is immaterial how long the defendant possessed either the firearm or ammunition. Courts have
12 held that “even if a felon held a firearm for a mere second or two, unless that felon truly did not
13 know that what he possessed was a firearm . . . , § 922(g) will still impose criminal liability.”

14 *United States v. Adkins*, 196 F.3d 1112, 1115 (10th Cir. 1999); *see also United States v. Lane*,
15 267 F.3d 715, 717 (7th Cir. 2001) (“momentarily handling a gun satisfied the legal definition of
16 ‘possession’ as a matter of law”); *United States v. Parker*, 566 F.2d 1304, 1306 (5th Cir. 1978)
17 (“That possession is momentary is immaterial.”).

18 The legislative history relating to § 922(g) shows that “Congress intended to
19 prohibit felons from exercising any physical control over a gun.” *Lane*, 267 F.3d at 718. The
20 Seventh Circuit noted:

21 Physical control over a gun is remarkably easy to effect. Once the gun is in the
22 defendant’s hands he need only pull the trigger, an act which can be completed in a split
second and which is controlled and influenced by nothing more than the defendant’s
whim.

23 *Id.* As such, any knowing possession of a firearm or ammunition by a felon – no matter how
24 short – violates the statute.

25 The law is also clear that two people can possess the same firearm. In the Ninth
26 Circuit, defendants can jointly possess a firearm in violation of § 922(g)(1) if “each knows of its
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1 presence and has the power and intention to control it.” See Ninth Circuit Model Jury Ins., No.
 2 3.18 (2003).

3 **3. Interstate Commerce**

4 The government must prove that the firearm has been shipped or transported from
 5 one state to another or from a foreign nation. See *United States v. Hanna*, 55 F.3d 1456, 1462
 6 (9th Cir. 1995) (holding that 18 U.S.C. § 922(g) requires only “the minimal nexus that a firearm
 7 have been, at some time, in interstate commerce”). The government is not required to prove that
 8 the defendant knew that the firearm or ammunition had moved in interstate commerce. See
 9 *United States v. Miller*, 105 F.3d 552, 555 (9th Cir. 1997) (holding that “knowledge requirement
 10 applies only to the possession element of § 922(g)(1), not the interstate nexus or to felon status”).

11 The ATF agent here – Thomas Cunningham – has been qualified as an expert
 12 witness in the United States District Courts for the Northern and Eastern Districts of California.
 13 The Ninth Circuit held in *United States v. Dunn* that an ATF agent could provide expert
 14 testimony regarding the identity of a gun’s manufacturer and where that manufacturer was
 15 located “to establish that a gun traveled in interstate commerce before the defendant received it.”
United States v. Dunn, 946 F.2d 615, 618 (9th Cir. 1991); see also *United States v. Beasley*, 346
 16 F.3d 930, 936 (9th Cir. 2003). In *United States v. Gann*, an ATF agent was allowed to provide
 17 expert testimony regarding where ammunition was manufactured based upon “characteristic
 18 shell markings and stamps.” *United States v. Gann*, 732 F.2d 714, 724 (9th Cir. 1984). And, in
 19 *United States v. Alvarez*, an ATF agent provided expert testimony that a firearm was
 20 manufactured in Spain based in part on the markings on the firearm: “Garnika, Spain.” *United*
21 States v. Alvarez, 972 F.2d 1000, 1003-04 (9th Cir. 1992).

22 In addition, the Ninth Circuit has held that inscriptions on a firearm are self-
 23 authenticating and fully admissible to prove where the gun had been manufactured. *Alvarez*, 972
 24 F.2d at 1004.

25 **4. Felony Conviction**

1 The government must prove that at the time he possessed the firearm or
 2 ammunition, the defendant had been convicted of a crime punishable by imprisonment for a term
 3 exceeding one year.

4 B. Violation of 18 U.S.C. 922(g)(3)

5 1. **Elements of the offense**

6 In the second count of the indictment, the defendant is charged with being a felon
 7 in possession of a firearm in violation of Section 922(g)(3) of Title 18 of the United States Code.
 8 The first two elements of the offense track the elements of 18 U.S.C. 922(g)(1):

- 9 • the defendant knowingly possessed the firearm as described in the
 10 indictment;
- 11 • the firearm had been shipped or transported from one state to another, or
 12 from a foreign nation to the United States.

13 The final element of a 922(g)(3) offense is that

- 14 • at the time the defendant possessed the firearm, the defendant was an
 15 unlawful user of or addicted to any controlled substance, as defined in
 16 section 102 of the Controlled Substances Act, 21 U.S.C. § 802.

17 2. **Unlawful User of Any Controlled Substance**

18 21 U.S.C. § 802(6) defines “controlled substance” to be any “drug or other
 19 substance, or immediate precursor,” listed in schedules I, II, III, IV, or V in 18 U.S.C. § 812.
 20 Cocaine, methamphetamine, and amphetamine are all schedule II drugs. 18 U.S.C. § 812.

21 “Neither § 922[g](3)¹ nor its legislative history provides a definition of ‘unlawful
 22 user.’” *United States v. Ocegueda*, 564 F.3d 1363, 1365 (9th Cir. 1977). Courts give the phrase
 23 “a common sense meaning,” *id.* at 1365, and the term has withstood as-applied vagueness
 24 challenges. *See id.* (holding that, given defendant’s consistent record of heroin use, term
 25 ‘unlawful user’ was not vague; limiting Ninth Circuit precedent allowing vagueness challenges);
 26 *United States v. Purdy*, 264 F.3d 809 (9th Cir. 2001) (finding no vagueness problem under facts
 27 of case); *United States v. Edwards*, 182 F.3d 333 (5th Cir. 1999) (same).

28 ¹At the time of that case, the relevant provision was codified at 18 U.S.C. 922(h)(3). It is
 now codified at 18 U.S.C. 922(g)(3).

1 The Ninth Circuit has held that the government must prove that the defendant
2 “took drugs with regularity, over an extended period of time, and contemporaneously with his
3 purchase of the firearm” in order to sustain a conviction under 922(g)(3). *Purdy*, 264 F.3d at
4 812-13. In that case, the defendant had admitted to using marijuana and methamphetamine
5 regularly, as well as operating a methamphetamine laboratory, but was not using drugs at the
6 time of his firearm possession arrest. In another Ninth Circuit case, the defendant’s heroin use
7 over a period of seven years, including a misdemeanor charge and enrollment in a misdemeanor
8 program, was sufficient to bring the defendant within the ambit of the statute. *Oceguada*, 564
9 F.3d at 1364. *See also United v. McIntosh*, 23 F.3d 1454 (testimony from acquaintances and
10 officers that defendant had admitted using marijuana sufficed).

11 The Ninth Circuit has not answered the question of whether regular and
12 prolonged use must be shown where a defendant is using drugs *while* possessing the firearm. An
13 Eighth Circuit case implies that such a showing might be sufficient. *United States v. McIntosh*,
14 23 F.3d 1454, 1458 (1994) (labeling defendant’s theory that government must prove use of
15 controlled substance contemporaneous with firearm possession “too restrictive[],” and allowing
16 lesser showings to sustain a conviction). One district court, however, found that regular and
17 prolonged use must be proven even when the defendant was unquestionably using drugs at the
18 time of the arrest. *United States v. Williams*, 216 F. Supp. 2d 568 (E.D. Va. 2002).

19 **III. JENCKS, BRADY AND GIGLIO DISCLOSURE (Crim. L.R. 17.1-1(b)(1-3))**

20 The United States has provided some and will provide the defense with copies of
21 all reports and police reports, defendant’s criminal history, witness interviews, defendant’s
22 statement and developed photographs known to the prosecution, and will make arrangements
23 upon request for the defense attorney to inspect evidence seized. As any new information is
24 obtained, it will be provided to the defense.

25 The United States believes that it has supplied all materials which may be
26 relevant as *Brady* material, and recognizes its obligation to continue to provide any such
27 materials within its possession, custody or control. The government also understands its
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1 continuing duty to comply with Rule 16 and will do so.

2 As of this date, the United States is not aware of any material exculpatory or
 3 impeachment information concerning the witnesses expected to testify in its case in chief that
 4 would be subject to disclosure pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v.*
 5 *United States*, 405 U.S. 150 (1972), *United States v. Bagley*, 473 U.S. 667 (1985), and/or *United*
 6 *States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991).

7 The United States requested discovery from the defendant by letter dated July 18,
 8 2007 for discovery pursuant to Federal Rules of Criminal Procedure, Rule 16, Rule 12.1 and
 9 Rule 26.2. As of this date, the United States has received no witness statements from the
 10 defendant or alibi information. The United States requests that the defendant be directed to
 11 comply with the discovery rules.

12 **IV. STIPULATIONS (Crim. L.R. 17.1-1(b)(4))**

13 There are currently no stipulations. After discussions between government and
 14 defense counsel, the government believes the parties will enter into three (3) stipulations:
 15 concerning the defendant's prior felony conviction; concerning the interstate nexus of the
 16 firearm and ammunition; and concerning prior positive drug tests by the defendant. Any
 17 stipulations will be presented to the Court upon entering them.

18 **V. NEED FOR INTERPRETERS (Crim. L.R. 17.1-1(b)(5))**

19 The government will not need interpreters for any witnesses it intends to call.

20 **VI. DISMISSAL OF COUNTS/ELIMINATION OF ISSUES (Crim. L.R. 17.1-1(b)(6))**

21 Two counts are currently alleged against the defendant. The government does not
 22 anticipate the dismissal of any counts.

23 **VII. JOINDER/SEVERANCE (Crim. L.R. 17.1-1(b)(7))**

24 There are no joinder or severance issues.

25 **VIII. INFORMANTS/PRIOR CONVICTIONS (Crim. L.R. 17.1-1(b)(8))**

26 The government is not using any informants. Two witnesses have suffered prior
 27 convictions. Thomas Houston has at least one prior felony conviction. Sophia Watkins was
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1 convicted of misdemeanor fraud or forgery with intent to obtain aid, and sentenced to probation.
2 She was also arrested several times, mostly on charges related to marijuana. Peggy Spannbauer
3 does not have a criminal record. NCIC records showed no match for Brian Anderson.

4 **IX. WITNESSES (Crim. L.R. 17.1-1(b)(9))**

5 The United States may call any of the witnesses listed below. The United States
6 reserves the right to amend that list at any time prior to and during the trial, if necessary.

7 Witnesses

8 Santa Cruz Sheriff's Office Deputies: Daniel Frietas, Tate Howe, Matthew
9 Pursley, Shay Johnson, Jose Zamora, Val Brenner

10 Merced County Sheriff's Office Deputy: Leon Pintabona

11 Santa Cruz Probation Officer: Jorge Rocha

12 Civilian witnesses: Sophia Watkins, Brian Anderson, Peggy Spannbauer, Thomas
13 Houston

14 Expert/technical witnesses: Thomas Cunningham, ATF; Lola Crain, Santa Cruz
15 Consolidated Emergency Communications Center Custodian of Records

16 **X. EXHIBITS (Crim. L.R. 17.1-1(b)(10))**

17 The United States may present any/all of the following exhibits:

18 Ex. 1: Color photograph of Steven Rodriguez standing next to police car

19 Ex. 2: Color photograph of 1535 San Andreas Road

20 Ex. 3: Color photograph of 1535 San Andreas Road parking lot and adjacent
21 street

22 Ex. 4: Color photograph of balcony outside Room #3, including Remington
23 Model 870 12 gauge pump-action shotgun, serial number V631321V, propped against railing

24 Ex. 5: Color photograph of Remington Model 870 12 gauge pump-action shotgun,
25 serial number V631321V

26 Ex. 6: Remington Model 870 12 gauge pump-action shotgun, serial number
27 V631321V

1 Ex. 7: One round of 12 gauge ammunition with head-stamp "R-P"
2 Ex. 8: One round of 12 gauge ammunition with head-stamp "Peters"
3 Ex. 9: One round of 12 gauge ammunition with head-stamp "Duck Symbol"
4 Ex. 10: Two rounds 12 gauge ammunition with head-stamp "Sellier & Bellot"
5 The government reserves the right to supplement the list as needed.

6 **XI. OBJECTIONS TO EXHIBITS OR TESTIMONY (Crim. L.R. 17.1-1(b)(11))**

7 The government is not aware of any objections that the defendant has to any
8 government exhibits. Because the government has not been informed of any of the defendant's
9 exhibits, the government has not had an opportunity to consider whether it will raise any
10 objections. In the event the defendant or the government does raise any such objections, the
11 government will attempt to resolve them.

12 **XII. LEGAL ISSUES LIKELY TO ARISE AT TRIAL (Crim. L.R. 17.1-1(b)(12))**

13 The United States will be filing motions *in limine* to preclude defendant from
14 raising the defense of self-defense, to preclude a self-defense jury instruction from being given,
15 and to preclude certain statements from being admitted at trial. The motion will likely be
16 opposed by the defense..

17 **XIII. SCHEDULING (Crim. L.R. 17.1-1(b)(13))**

18 The United States anticipates that presentation of its case-in-chief will last
19 approximately two days, depending on *in limine* rulings.

20 **XIV. JURY VOIR DIRE (Crim. L.R. 17.1-1(b)(14))**

21 The United States will submit proposed voir dire questions.

22 **XV. JURY INSTRUCTIONS (Crim. L.R. 17.1-1(b)(14))**

23 The government expects the parties attempt to prepare jointly-submitted proposed
24 jury instructions. To the extent the parties are not able to agree on certain instructions, the
25 United States will separately file proposed jury instructions.

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2 XVI. OTHER ISSUES (Crim. L.R. 17.1-1(b)(15))

3 The United States requests an order compelling the defense to provide reciprocal
4 discovery, including an exhibit list, to the government prior to trial.

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6 DATED: July 21, 2008

7 Respectfully submitted,

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9 JOSEPH P. RUSSONIELLO
10 United States Attorney

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13 By: /s/
14 JEFFREY B. SCHENK
15 Assistant United States Attorney

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